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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 641

AETNA LIFE INSURANCE COMPANY,
Petitioner,

vs.

JEANNETTE E. BARNETT AND LEON E. STROPP.

No. 642

AETNA LIFE INSURANCE COMPANY,
Petitioner,

vs.

SAVINGS INVESTMENT & TRUST COMPANY.

No. 643

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *Petitioner,*

vs.

JEANNETTE E. BARNETT.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

EDWARD A. MARKLEY,
Counsel for Petitioners.

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JEANNETTE E. BARNETT.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Aetna Life Insurance Company and The Equitable Life Assurance Society of the United States (hereinafter called defendants) respectfully present this pe-

tition for writs of certiorari to review the final judgments of the United States Circuit Court of Appeals for the Third Circuit rendered December 9, 1943, which affirmed money judgments of the United States District Court for the District of New Jersey in favor of respondents (hereinafter called plaintiffs) and against petitioners (R. 565).

Summary and Short Statement of Matter Involved.

(The references are to Volume I of the appendix unless otherwise noted.)

Three suits entitled as follows were instituted in the New Jersey Supreme Court for the death proceeds of three policies of insurance issued in the amounts noted on the life of Robert J. Barnett (hereinafter called Barnett):

	Relationship of Plaintiffs to Insured.	Amount of Policy.
Savings Investment & Trust Company, a Trust Company, Plaintiff, vs. Aetna Life Insurance Company, a Corporation, Defendant.	Creditor of Insured's company—Discount Corporation of America. Policy assigned absolutely to plaintiff.	$50,000.00
Jeannette E. Barnett and Leon E. Stropp, Plaintiffs, vs. Aetna Life Insurance Company, a Corporation, Defendant.	Jeannette E. Barnett—wife of Insured; Leon E. Stropp—creditor of Insured.	$30,000.00
Jeannette E. Barnett, Plaintiff, vs. Equitable Life Assurance Society of the United States, Defendant.	Wife of Insured.	$5,000.00

They were removed to the federal court because of diverse citizenship and consolidated for trial.

The only issue at the trial was, "is the insured dead?" Plaintiffs submitted no direct proof of insured's death but in lieu thereof proved that insured's wife and close relatives have not seen or heard from him since Dec. 28, 1932. That proof created a presumption that insured died on

~~Feb.~~ Dec. 28, 1939, because of the New Jersey Presumption of Death Statute (N. J. R. S. (1937) 3:42-1), which reads as follows:

> "If a resident or nonresident of this state remains beyond the sea, absents himself from this state or from the place of his last known residence, or conceals himself in this state or in the place of his last known residence, for seven years successively, he shall, whenever his death comes into question, be presumed to be dead, unless it is proved he was alive within that time."

Defendants proved by witness Cutsler that insured is not dead and was seen alive as late as November or December, 1940 (R. 461a). In addition, the following witnesses saw or heard from him since Dec. 28, 1932:

a. Marie Jordan Fosselli (hereinafter called Marie Jordan), a friend with whom insured was carrying on an illicit affair prior to Dec. 28, 1932 (R. 229a, 259a, 263a, 269a). She spoke with him on the telephone in February, 1933 (R. 239a, 241a).

b. Albert H. Starke saw him in New York City in October, 1933, when he used to come to an apartment house on West 12th Street to visit his friend, Raymond Hatch, who had his home in East Orange, New Jersey, and an apartment on West 12th Street for his paramour, Alma Rivers (R. 432a, 427a, 437a).

c. James Joseph Donlon saw him in New York City in the summer, fall and winter of 1934 (R. 445a) when he used to come to an apartment house on East 78th Street to call for Alma Rivers, former paramour of Raymond Hatch who was now dead, having died in the West 12th Street apartment of Alma Rivers (R. 433a).

d. Francis X. Sullivan saw him in New York City in the spring and summer of 1934 (R. 360a, 361a) when he used to come to an apartment house on East 78th Street to call for the same Alma Rivers who lived there with Ruth Baum (R. 365a, 366a).

e. George R. Bradshaw saw him in New York City in the summer of 1939 when he used to come to an apartment house on East 22nd Street to visit the same Ruth Baum who formerly lived with Alma Rivers (R. 407a-409a).

None of the foregoing knew Barnett before his disappearance except Marie Jordan. The identifications made by the witnesses on the stand were made from copies of a photograph (Ex. D-3) which Mrs. Barnett identified as a picture of her husband (R. 71a).

The pertinent facts with respect to Barnett's disappearance from his New Jersey abode are as follows: In July, 1929, he was president of the East Orange Trust Company (R. 112a) when he resigned and organized the Discount Corporation of New Jersey (R. 331a). In 1932, he attempted to obtain stock control of the East Orange Trust Company (R. 176a). He arranged to finance his scheme with plaintiff, Savings Investment & Trust Company. In fact, he apparently thought that he was acting for the Savings Investment & Trust Company in negotiating with holders of the East Orange Trust Company stock (R. 93a). In any event, he failed in his purpose to acquire voting control of the East Orange Trust Company and he found himself hopelessly indebted to plaintiff, Savings Investment & Trust Company (R. 174a, 175a). He instituted suit against that company in an attempt to sustain his contention that that bank was the principal and he was only the agent in the negotiations for the East Orange Trust Company stock (R. 93a). He failed in that suit (Ex. D-11, R. 97a, Vol. II of appendix). In addition to his own obligations to Savings Investment & Trust Company, he had persuaded several of his friends to enter into the scheme with him (R. 174a, 175a, 352a, Ex. D-11, R. 97a, 98a, Vol. II of appendix) and when the New Jersey Chancery Court dismissed his suit to have Savings Investment & Trust Company declared

principal in the plan to acquire the East Orange Trust Company stock, not only did Barnett face financial obliteration but so did his friends, Simpson and Freytag and others. The loss of that suit was a genuine tragedy for Barnett (R. 42a, 92a). The decree dismissing Barnett's suit against Savings Investment & Trust Company was announced orally about two weeks before Barnett absconded (R. 352a) and was actually signed the day before he absconded (R. 351a). When Barnett absconded it was found that the Discount Corporation was hopelessly insolvent (R. 348a). Barnett had complete control of the Discount Corporation. He was in sole charge of the fiscal books and records (R. 332a, 333a), which on search after Barnett absconded were found to have been destroyed (R. 319a, 322a).

After Barnett absconded a receiver was appointed for the Discount Corporation (Exhibit D-10). Defendants offered in evidence the inventory and account of receiver (R. 346a, 347a) for the purpose of showing the extremely hopeless financial condition of Barnett's Discount Corporation. This offer was excluded by the trial judge and his ruling was affirmed by the Circuit Court of Appeals (R. 6 of opinion).

An additional fact surrounding Barnett's disappearance was that Marie Jordan had sent a telegram to his house requesting money (Ex. D-1, R. 71a, Vol. II of the appendix). That telegram came to the attention of Barnett's wife (R. 65a) and the police authorities were informed of it by Mr. and Mrs. Barnett (R. 65a). The affair continued after the demand for money (R. 281a). Therefore, on December 28, 1932, Barnett, who had been a highly respected banker in East Orange, found himself hopelessly in debt, facing discovery of his embezzlements from the Discount Corporation, responsible for the financial ruin of several of his friends who were well regarded businessmen living in East Orange, and furthermore, all those troubles were compli-

cated by the fact that his paramour was indulging in a mild form of blackmail, the instrument of blackmail having been brought to the attention of his wife and the authorities in his place of residence. In this situation Barnett mailed the following letter to his wife on Dec. 28, 1932 (R. 46a-47a):

"Dearest Jen:

"My heart is broken—my spirit is gone and I am almost crazy. I cannot go on.

"For your sake, Dearest, while something is left—I must make the sacrifice—for you and your future. What have you to look forward to with me. You are too good, too wonderful, as you have been a wife and companion, to suffer longer. See H. C.—don't let the insurance lapse, see L. E. S. about this.

"It is your salvation, there should be about $25,000—out of Stropp's balance pay H. C. 7500—Henry 4500 and Ed W. S. $2,500. Take care of Father's $1,500 ($500 old).

"Forgive me and may God bless you and protect you as long as you live.

"Bob."

and took the steamer "Plymouth" to Fall River. When he boarded the boat he had with him a suitcase and a large bundle (R. 119a, 203a). At Fall River, when his stateroom was examined, the following situation presented itself (R. 213a-215a). The window leading to the deck was open, a small chair was near the window, the door was locked and the key was on the inside of the door, clippings with respect to the loss of his case against Savings Investment & Trust Company were on the top berth with his auto license, $20.00 was found in his clothes and $2.55 was on the bureau in the stateroom. All of his clothes were there except his socks and underwear. The suitcase and large bundle were not there. His ticket was not there. The lower berth had been used. His Masonic button was in the stateroom but his ring with his initials was missing.

The ticket which he purchased was for boat passage to Fall River and railway passage to Boston. The practice followed on the boat was to collect the boat part of the ticket on disembarkation. A consideration of the foregoing facts shows that Barnett tried to make it appear that he committed suicide. His attempt to simulate suicide was a very poor one.

In fact, it is so clear that Barnett did not commit suicide that plaintiffs themselves abandoned any claim they had made to suicide (p. 320a) and the trial judge expressly instructed the jury as follows (p. 528a):

> "Now, in this case there has been some evidence of either a real or a feigned suicide. I direct your attention to it because it is my thought that the evidence might confuse you. *These suits, however, are not predicated upon an alleged suicide. The plaintiffs rely, as I have told you, upon the presumption created by statute.* Therefore there is no burden on the plaintiffs to prove that the insured, in fact, took his own life. That evidence is merely a factor for your consideration." (Italics ours.)

The case was submitted to the jury who returned verdicts in favor of all plaintiffs (R. 535a), and judgments were entered for the amount of each policy, plus interest thereon from February 27, 1940, the date on which the alleged proofs of death were submitted to defendants (R. 539a, 544a). Defendants appealed to the Circuit Court of Appeals for the Third Circuit which affirmed the judgments.

Jurisdictional Statement.

The jurisdiction of this Court is invoked under 28 U. S. C. 347 (a). The judgments of the Circuit Court of Appeals of which review is sought were entered thereon on December 9, 1943.

Questions Presented.

1. Since the only issue in the case was, "Is the insured dead?"—Did the trial court err in placing on the defendants the burden of proof on that issue?

2. Did the trial court act contrary to the provisions of 28 U. S. C. 695 in excluding inventory and account of receiver of insured's Discount Corporation of New Jersey?

Reasons for Allowance of Writs.

Petitioners submit the following reasons for the allowance of writs of certiorari to review the judgments of the Third Circuit:

1. The Circuit Court of Appeals in affirming the District Court's instructions to the jury which placed on defendants the burden of proof on the only issue of the case has decided an important question of local law in a way probably in conflict with the applicable decisions of the highest Court of the State of New Jersey.

2. The Circuit Court of Appeals in affirming the District Court's rejection of the inventory and account of receiver (Exhibit D-9) which was clearly admissible under 28 U. S. C. 695 has decided an important question of federal law which has not been but should be considered by this Court.

Wherefore, your petitioners respectfully pray that writs of certiorari issue to the United States Circuit Court of Appeals for the Third Circuit and submit herewith their brief in support of this petition.

Respectfully submitted,

EDWARD A. MARKLEY,
Attorney for Petitioners.

Dated: December 23, 1943.

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Nos. 641-2-3

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AETNA LIFE INSURANCE COMPANY,

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THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

vs. *Petitioner,*

JEANNETTE E. BARNETT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

A.

The Opinion of the Court Below.

The opinion in the Circuit Court of Appeals is not yet reported but is printed in volume one of the appendix (R. 559). No opinion was filed by the District Court.

B.

Jurisdiction.

I.

The jurisdiction of this Court is sustained by Section 240 of the Judicial Code as amended by the Act of February 13, 1925, (U. S. C. A. Title 28, Sec. 347).

II.

The date of the judgment to be reviewed is December 9, 1943 (R. 565).

III.

The grounds on which jurisdiction in this Court is invoked are set forth in the reasons for allowance of writs in the petition.

IV.

Statement of the Case.

The case has been stated under heading "Summary and Short Statement of Matter Involved" in the petition.

Summary of Argument.

Our argument will be divided into the following main points:

1. The only issue in the case was, "Is insured dead?" The local or New Jersey law places the burden of proof on that issue on plaintiffs. It was error to place on defendants the burden of proof on that issue.

2. Since the inventory and account of receiver (Exhibit D-9) was admissible under 28 U. S. C. 695, its rejection as evidence was error.

There were several points argued by us on the appeal to the Circuit which are not raised on this application. Since a large part of the Circuit Court's opinion is given over to matters not raised on this application, we point out that we are not complaining here of the Circuit Court's disposition of the following points made by us on the appeal to the Circuit:

1. Since the statutory presumption of death created by proof of insured's absence from his New Jersey abode was entirely destroyed by defendants' proof that insured was alive after he absconded, the trial court erred in denying defendants' motion for a directed verdict.

2. The trial court erred in excluding proof of the practice on the steamer "Plymouth" with respect to the collection of tickets on disembarkation.

3. The trial court erred in excluding defendants' offer of proof of the criminal complaint and indictment found against insured Barnett.

ARGUMENT.

I.

The only issue in the case was, "Is insured dead?" The local or New Jersey law places the burden of proof on that issue on plaintiffs. It was error to place on defendants the burden of proof on that issue.

The Circuit Court disposed of our contention that the trial judge erred in his charge on the important question of burden of proof by the following short paragraph in the main opinion by McLaughlin, J. (R. 563):

> "The appellants' next point is that the court erred in its charge with respect to burden of proof. They attempt to isolate two sentences from the charge in

> support of this. A reading of the entire charge shows the trial court to have fairly presented this phase of the matter to the jury."

We submit that statement is an attempt to evade our argument rather than answer it. The portion of the charge which we contend is erroneous is not an incomplete excerpt taken out of its context but the following clear and definite statement of the trial court's view of the law (R. pp 527a-528a):

> "You are instructed that under the statute the burden is upon the defendants to prove by a fair preponderance of the evidence that the insured was, in fact, alive within the period."

The error contained in the foregoing is reiterated in another part of the charge when the court said (R. p. 530a):

> "* * * I have instructed you that the burden is on the defendants to establish by a fair preponderance of evidence that the insured was, in fact, alive."

The error was again reiterated in refusing to charge the following requests submitted by defendant (R. p. 536a):

> "3. The burden is upon the plaintiffs to prove by the greater weight of the evidence that the insured in the policies sued upon, namely, Robert James Barnett, is dead.
>
> "4. Before the plaintiffs can recover on the policies of life insurance sued upon, they must first prove by the greater weight of the evidence the death of the insured named in the policies, namely, Robert James Barnett.
>
> "5. Before the plaintiffs can recover they must prove by the greater weight of the evidence that prior to the institution of these suits and prior to February 27, 1940 when they filed their alleged proofs of death with

the defendant companies, that the said insured, Robert James Barnett, was dead.

"6. This burden of proving by the greater weight of the evidence that the said Robert James Barnett was dead prior to the institution of these suits and prior to February 27, 1940 when the alleged proofs of death were filed, is always upon the plaintiffs throughout this case, and that burden of proof never shifts. If you find that the plaintiffs have not borne that burden of proof they cannot recover and your verdict must be for the defendants."

Under the doctrine of *Erie R. R.* v. *Tompkins*, 304 U. S. 64, the burden of proof is substantive and a federal court must in a non-federal matter, such as this case is, follow the applicable state rule.

Cities Service Oil Co. v. *Dunlap*, 308 U. S. 208

Moore's Federal Practice, 1942 Supp. to vol. 3, Sec. 43.02, p. 2041, n. 33; 1942 Supp. to vol 1, Sec. 8.10, p. 571.

Under the law of New Jersey, plaintiffs had the burden of proof throughout the trial and that burden never shifted to defendants. In *Kresse* v. *Metropolitan*, 111 N. J. L. 474 (Court of Errors & Appeals, 1933), Chief Justice Brogan said at page 479:

"It is fundamental that when a plaintiff has established a *prima facie* case the defendant is bound to controvert it by evidence or suffer judgment. When evidence is submitted by the plaintiff on the one hand and by the defendant on the other, then the question arises as to whether the burden of proof has been sustained by the plaintiff upon whom it has rested from the beginning. *It is not shifted by the proceedings during the trial, and the jury should be instructed that all material facts tendered by the moving party must*

be established by that party by a preponderance of the evidence.''

To the same effect are:

State v. *Giordano,* 121 N. J. L. 469

Carroll v. *Prudential,* 125 N. J. L. 397

Schlosser v. *Goldberg,* 123 N. J. L 470 (Supreme Court, 1939).

In the last named authority Chief Justice Brogan said at page 473:

> ''The plaintiff has the burden of proving his case and we think that no citation of authority is required for that fundamental proposition.''

See also:

Cramer v. *John Hancock,* 18 N. J. Misc. 368 (Atlantic County Circuit Court, 1940);

Kopacka v. *Roman & Greek Catholic Gymnastic Slovac Union Sokol, supra,* at 589;

Cvelich v. *Erie,* 120 N. J. L. 414 (Supreme Court, 1938), at 416;

Lodge—Evidence in New Jersey Practice (1942), Sec. 235.

In *Cella* v. *Roth,* 113 N. J. L. 458 (Court of Errors & Appeals, 1934), Wells, J., speaking for a unanimous court, said at page 463:

> ''The burden of proof never shifts from the one asserting a cause of action. If the plaintiff makes out a *prima facie* case and the defendant offers an explanation which leaves the jury in a state of equipoise on the question of negligence, the defendant is entitled to a verdict. He is never under a duty of showing by the weight of the evidence that he is innocent of negligent conduct. The defendant did not have to prove

by the weight of the evidence that another was guilty but was entitled to be relieved of liability if he showed enough to make the jury feel that his negligence was not proved by the greater weight of the evidence."

In *Hughes* v. *Atlantic City*, 85 N. J. L. 212 (Court of Errors & Appeals, 1914), Swayze, J., speaking for a unanimous court, said at page 213:

"The learned trial judge in view of the high degree of care required of a carrier of passengers told the jury that 'when an accident of this kind happens to some of the means of transportation, *the law shifts the burden of proof from the plaintiff as to the explanation or showing the actual cause to the defendant, and imposes upon it the burden of making an explanation exculpating itself from negligence.*' The question he put to the jury was: 'Has the defendant done that?' To leave no doubt of his meaning he added: 'The explanation is one that you must pass upon, whether or not the burden which the law casts upon the defendant in a case of injuries, an accident of this kind, has been met. If it has, then, of course, the negligence that the law would infer from the proof of the facts of the accident and the nature of it, does not exist, and the company would not be answerable at all.'

"*The effect of this charge was to relieve the plaintiff from the duty to satisfy the jury by the preponderance of the evidence that the defendant had been negligent, and to deprive the defendant of his right, which we have said is a substantial one,* to have the plaintiff bear the burden of the affirmative. *Bien* v. *Unger*, 35 Vroom 596; *McGilvery* v. *Electric Light and Power Co.*, 34 Id. 591. *The learned trial judge distinctly said that this burden shifted to the defendant and he did not even submit to the jury the question whether the plaintiff had established negligence;* he treated that as a matter of legal inference and only left to the jury to say whether the defendant had exculpated itself. *He thus put upon the defendant in a case where there was no direct evidence of negligence*